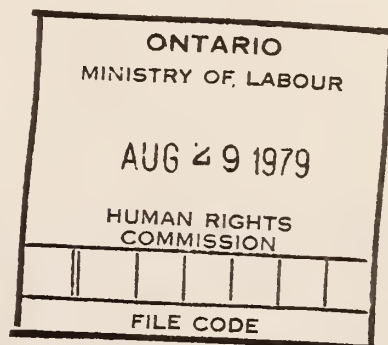


99
IN THE MATTER OF THE ONTARIO HUMAN RIGHTS CODE

AND

IN THE MATTER OF the complaint made by Mr. Jerry Snyder of International Falls, Minnesota, alleging discrimination in employment because of nationality and place of origin by the Fort Frances-Rainy River Board of Education



DECISION

BOARD OF INQUIRY

E.J. RATUSHNY

DATED: AUGUST 28, 1979

IN THE MATTER OF THE ONTARIO HUMAN RIGHTS CODE 1970

AND

IN THE MATTER OF the complaint made by Mr. Jerry Snyder of International Falls, Minnesota, alleging discrimination in employment because of nationality and place of origin by the Fort Frances-Rainy River Board of Education

DECISION

On the 29th day of March, 1979, I was appointed on Board of Inquiry under the Ontario Human Rights Code R.S.O. 1979 c. 318 as amended, to hear and decide the Complaint by Mr. Jerry Snyder of International Falls, Minnesota, that he was terminated from his employment because of his nationality and place of origin by the Fort Frances-Rainy River Board of Education (hereinafter referred to as "the Board").

A number of delays were experienced in attempting to schedule the hearing. After waiting for some time to be informed as who would represent the Board at the hearing, I wrote directly to the Board. By letter dated June 7, 1979, Mr. A.J. Gillies, Director of Education, replied (with copies to all parties) and raised two objections:

"First, the Board, through its counsel Mr. Phillips, raised the question of the Commission's jurisdiction to proceed with its investigation of the matter.

Second, the Board has filed a complaint of "harassment" against the Ontario Human Rights Commission because the Board feels that it is being put in the position of having to retain counsel at a cost to defend itself while a teacher, who is surplus to its needs and who was declared redundant, with years of service and qualifications as criteria, is using the Ontario Human Rights Commission to plead his case."

However, on June 28, 1979, I received another letter from Mr. David Eryou, who informed me that he had been retained by the Board and requested a reasonable period of time to prepare. Much to Mr. Eryou's credit, matters proceeded expeditiously from that point on and the hearing was scheduled for August 22nd in Fort Frances. I subsequently received a letter from the Legal Directorate of the Ombudsman advising me that they considered the complaint by the Board to the Ombudsman to have been withdrawn.

The Complaint of Mr. Snyder states:

"I am an American citizen and believe that I have been dismissed, refused continued employment and discriminated against with respect to the terms and conditions of my employment because of my nationality and place of origin in contravention of Section 4(1) b,g, of the Ontario Human Rights Code..."

At the outset of the hearing, counsel for the Board made a number of admissions and all parties agreed to the introduction into evidence of a number of documents. As a result, only one witness was called, namely, the Complainant, Jerry Snyder.

Mr. Snyder's testimony established clearly that he was qualified to teach and that he carried out his duties conscientiously. In addition to his teaching responsibilities he also participated in extra-curricular activities with the students such as noon-hour sports, week-end treks and coaching hockey in the community. He resided continuously at International Falls, some six and one-half miles from the school. While he experienced some delays in crossing the border during his first two years of teaching (starting in 1968), there was no such problem in subsequent years.

Mr. Snyder's testimony, particularly under cross-examination, indicated that he obtained "landed immigrant" status prior to his first year of teaching. This status was a pre-requisite for summer courses which Mr. Snyder had undertaken to pursue during his first two summers, as a condition of his employment. He resided at Kingston while taking the summer courses but his family remained in International Falls. When the summer course was completed, the landed immigrant status was allowed to drop.

At the time when he was first hired, the Board had asked him to move to Canada. Mr. Snyder testified that he was giving the matter serious consideration at the time but subsequently decided not to move. The Board also offered to pay his moving expenses and may have assumed that he intended to become a Canadian citizen.

Apart from the two summers when Mr. Snyder resided in Kingston, he was, throughout his employment by the Board, a resident of International Falls, Minnesota. He was also (and continues to be)

an American citizen at all relevant times. He was dismissed by the Board at the end of the 1977-78 contract year.

Mr. Eryou admitted at the outset that Mr. Snyder was dismissed by the Board as a result of the application of the following provisions of "Policy 29" of the Policies and Regulations related to Redundancy in Secondary Schools:

"5...teachers will be declared surplus in the following order of priority:

- a)...
- b) A teacher who is not a Canadian citizen.
- c) A teacher who is not a resident in Canada."

He also conceded that this "Policy" is nothing more than a guideline and has no legislative force.

It was argued on behalf of the Board, first of all, that the ground of discrimination prohibited under the term "nationality" does not encompass "citizenship". The term had to be understood in the entire context of a federal state and the jurisdiction of the central government in relation to these matters. As a consequence, the word "nationality" should be limited in meaning to "national origin".

However, this approach fails to take into account the specific inclusion in the Ontario Human Rights Code of "place of origin" as another head of prohibited discrimination. The constitutional issue was not pressed and, in any event, I agree with counsel for the Commission that the "pith and substance" of section 4(1)(b) of the Code is the regulation of employment in Ontario.

In my view, the term "nationality" in the Ontario Human Rights Code is broad enough to prohibit discrimination on the basis of citizenship. While not in any way bound by it, I adopt the following discussion by Professor Ian Hunter as an accurate analysis of the relationship of these terms:

"The term 'citizenship' and 'nationality' refer to the status of the individual in his relationship to the state and are often used synonymously. The word 'nationality' however, has a broader meaning than the word citizenship. Likewise the terms 'citizen' and 'national' are frequently used interchangeably. But here again the latter term is broader in its scope than the former. The term 'citizen', in its general application is applicable only to a person who is endowed with the full political and civil rights in the body politic of the state. The term 'national' includes a 'citizen' and a person, who, though not a citizen, owes permanent allegiance to the state and is entitled to its protection."

Support for this interpretation can also be found in the Decision of Professor Tarnopolsky in the Complaint of Dr. M. Akram Rajput. (dated May 12, 1976) and in the reasons of the majority of the House of Lords in London Borough of Ealing v. Race Relations Board [1972] 1 All E.R. 105.

No argument was advanced with respect to the meaning of the term "place of origin". On the facts of this case, it might have been argued that the factor of "residence" falls outside of "place of origin". For example, if Mr. Snyker had moved to Fort Frances and obtained citizenship, he would have met the criteria of the Board's policy even though his "place of origin" would remain unchanged. In other words, "residence" might be

a permitted basis for discrimination, even though "citizenship" is not. In view of my earlier determination with respect to "nationality" and in the absence of argument from counsel, I do not propose to deal with this issue since it cannot affect the ultimate result.

The main thrust of Mr. Eryou's argument on behalf of the Board is the contention that since the employment of teachers in Ontario is already subject to supervision by statute and regulations, the Ontario Human Rights Code can have no application to the facts of this case. This argument was expressed in alternate ways: Since other legislation creates an entire framework of employer-employee relations, the Ontario Human Rights Commission has no jurisdiction to intervene. Since the Board is obligated by statute to employ only persons qualified under that other legislation, it is required by law to discriminate on the basis of citizenship since Canadian citizenship is a mandatory qualification under that legislation and the Ontario Human Rights Code cannot be taken to over-ride these specific requirements. Since Canadian citizenship is a mandatory qualification under that other legislation, it automatically constitutes "a bona fide occupational qualification and requirement" under section 4(7) of the Ontario Human Rights Code, thereby rendering the provisions of section 4(1)(b) inapplicable.

The issue can be summarized in general terms by asking:
Is there a conflict between section 4(1)(b) of the Ontario Human Rights Code and the relevant (and related) provisions of the Education Act 1974 S.O. c. 109? If so, which is to prevail?

In spite of Mr. Eryou's resourceful argument, I have concluded that on the facts before me, the Fort Frances-Rainy River Board of Education was not required by statute or regulations to dismiss Mr. Snyder. Therefore, in this case there did not exist any incompatibility between the Code and other laws of the Province of Ontario. The result is that the dismissal of Mr. Snyder, by the Fort Frances-Rainy River Board of Education, because of his citizenship constitutes discrimination because of nationality contrary to section 4(1)(b) of the Code.

The argument on behalf of the Board may be summarized as follows:
(1) By virtue of Section 146.11. of the Education Act, 1974, the Board is required to appoint teachers, "all of whom shall be qualified according to this Act and the regulations".
(2) Regulation 100 under the Department of Education Act R.S.O. 1970 c. 111, provided that:

"2(1) Every applicant for a permanent teaching certificate under this Regulation shall submit to the Deputy Minister,
(a)...
(b) in the case of an applicant who was born outside the Commonwealth of Nations, evidence that he is a British subject or a Canadian citizen."

(3) Mr. Snyder's "Application For A Permanent Teaching Certificate" dated September 19, 1972 did not comply with the requirement of Regulation 199. Indeed, there is a strong inference that Mr. Snyder sought deliberately to conceal from the Deputy Minister his residence in the United States since the Application Form shows his "Home Address" as simply "Box 93 Island View Rte" without reference to International Falls.

(4) Since the Application failed to comply with the statutory condition, the certificate could not be granted and was completely invalid.

(5) As a result, Mr. Snyder was not qualified to teach and had to be dismissed by the Board.

Mr. Sopinka responded by arguing that:

(1) the requirement of submitting evidence of Citizenship was merely directory and not a condition precedent to the validity of the certificate. The Deputy Minister would have had Mr. Snyder's entire file before him. The proper inference is, therefore, that the Deputy Minister had notice that Mr. Snyder was not a Canadian citizen and did not require such proof. This view of the facts is supported by the existence of s. 10(1)(b) of the Department of Education Act at the time when the application was considered.

The section provided:

"10-(1) The Minister may

(a)...

(b) accept in lieu of any requirement prescribed for a teacher, head of a department, director, supervisor or supervisory officer, or for a

candidate for a certificate or for admission to a school, such evidence of experience, academic scholarship or professional training as he considers equivalent thereto;"

Moreover, Mr. Green points out, s. 227(3) of the Education Act, 1974, provides that "All certificates of qualification are valid for such periods as the regulations prescribe." Since the regulations have never imposed time limitations upon the validity of certificates, their validity continues in the absence of clear words of limitation.

(2) Section 20(2) of Ontario Regulation 704/78 under the Education Act, 1974, specifically provides that a person qualified to hold an Ontario Teacher's Certificate "except that he is not a Canadian citizen" may still teach in a school or subject "for which his certificate or letter of standing is valid or in which he has received professional education as indicated". In other words, this section preserves the validity of a certificate which was validly held by a teacher who is not a Canadian citizen. It would be ludicrous to say that the certificate was invalid because the holder was not a Canadian citizen when the whole purpose of this provision is to preserve the validity of the certificates of persons who are not Canadian citizens.

With great respect for Mr. Sopinka's spontaneous ingenuity, I have concluded that this second argument begs the question as to the validity of the certificate in the first place. It is only "valid" certificates which are preserved by this regulation. The regulation does not, therefore, offer any assistance on the

issue of the validity of Mr. Snyder's certificate.

The Board's position, then, comes down to this: Mr. Snyder was dismissed because of his citizenship. However, the Board had no choice. Mr. Snyder's certificate is invalid because he is an American citizen. Since he is not qualified, the Board must dismiss him.

I cannot accept the conclusion that Mr. Snyder's certificate was necessarily invalid. Mr. Sopinka's first argument in response to the contention of invalidity, convinces me that it would be entirely speculative and inappropriate for me to attempt to determine the validity of Mr. Snyder's certificate.

There is no specific statutory provision or regulation compelling the Board to dismiss Mr. Snyder. There is, therefore, no justification for the prima facie contravention of section 4(1)(b) of the Code which has been admitted by the Board.

It is true that Mr. Snyder's Application for a Permanent Teaching Certificate was less than candid. However, it should also be kept in mind that the section of Regulation 199 requiring evidence of citizenship, also provides:

"(2) An applicant shall not be granted a permanent teaching certificate under this Regulation until he has been recommended by the supervisory officer concerned in Form 2."

Mr. Snyder's Application was also signed by the Principal and the Chief Supervisory Officer.

As mentioned earlier, argument proceeded on the basis of a very limited amount of evidence. Nevertheless, I cannot help but agree with Mr. Green's observation that the position taken by the Board at the hearing does not bear the strain of reality. There is no evidence of the Board questioning Mr. Snyder's qualifications at any time prior to this hearing. In fact, the position of the Board at the hearing can be summarized as a creative but unsuccessful attempt to find a justification in the Education legislation for dismissing Mr. Snyder because of his citizenship in contravention of the Ontario Human Rights Code.

In fact, one can be sympathetic to the difficult situation in which many school boards find themselves in Ontario to-day. It is no secret that there is a surplus of well-qualified teachers and it is no easy task to find an equitable basis upon which to select one experienced teacher over another.

Counsel for the Board argued that if the Code precluded citizenship as a criterion for hiring teachers, it would also over-ride provisions in other statutes and regulations such as those governing the legal profession. However, that is not the case. The Ontario Human Rights Code was specifically amended to deal with the self-governing professions. The relevant provision is as follows:

"4a.(2) No self-governing profession shall exclude from membership or expel or suspend any person or member or discriminate against any person or member because of race, creed, colour, age, sex, marital status, ancestry or place of origin.

(1972 S.O. c. 119 s. 6)

Thus, there is no prohibition against discrimination based upon "nationality" (including citizenship) in the context of the self-governing professions.

It may well be that similar amendments would be appropriate in relation to the teaching profession. While the Education provisions were not found to be incompatible with the Code in this case, such a clash could well present itself in future. However, these are issues of legislative policy beyond my jurisdiction.

Since I have decided under section 14 c.(a) of the Code that there has been a contravention by the Board, it remains to consider section 14 c.(b) which provides that a board of inquiry:

"may order any party who has contravened this Act to do any act or thing that, in the opinion of the board, constitutes full compliance with such provision and to rectify any injury caused to any person or to make compensation therefore."

In the event of a finding that a contravention had occurred, Mr. Sopinka requested an order requiring the Board to:

- (1) Reinstate the Complainant;
- (2) Pay the Complainant a sum of money equivalent to the salary he would have received for the 1978-1979 school year (i.e. his 1977-1978 salary together with the normal increase he would have received); and
- (3) Pay the Complainant a sum by way of compensation for injuries to feelings and reputation. He suggested a figure in the range of \$1500 to \$3000 under this head.

In my view, reinstatement and compensation for lost salary are necessary to constitute "full compliance" and to "rectify" the "injury caused" by the Board's contravention of section 4(1)(b) of

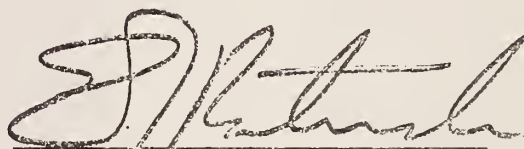
the Ontario Human Rights Code. The Fort Frances-Rainy River Board of Education is hereby ordered to pay Mr. Snyder a sum equivalent to his 1977-1978 salary together with the increase he would have normally received for the 1978-1979 contract year had he not been dismissed. In addition, the Board is ordered to reinstate Mr. Snyder for the 1979-80 contract year at the salary which he would have normally received if his employment had continued unbroken.

However, I feel that the evidence is insufficient and the circumstances inappropriate to warrant general compensation for injuries to feelings and loss of reputation. There was no suggestion in the evidence that the complainant's reputation as a teacher was damaged in any way by his dismissal, which was based upon his citizenship and residence.

While Mr. Snyder's feelings may have been injured by his dismissal, he was also presented with the opportunity to work full time at his sporting goods business (while receiving a full year's teaching salary). During this year, the business expanded from a part time to a full time endeavour. According to Mr. Snyder's testimony, he did not draw any income from the business during the year when he did not teach. However, there was a suggestion in his evidence that this was the result of having to pay off loans of the business. In other words, there may well have been a substantial increase in his equity in the business during this period. If there had been evidence to this effect, it might have been appropriate to set-off such an increase against the award of lost salary. There was no such evidence. Nor was there any evidence as to Mr. Snyder's personal feelings with respect to his dismissal.

He may have been delighted to have the opportunity to work full time at his business, particularly in retrospect, with the award of his salary for the year. In all of these circumstances, an award of general compensation would be entirely speculative in this case. I assume that Mr. Snyder will re-pay the unemployment insurance benefits which he received.

Dated at Ottawa, This 28th day of August, 1979.



E.J. Ratushny
Board of Inquiry

